

DIVISION I

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
OLLY NEAL, Judge

CA05-1086

April 12, 2006

LINDA BAIRD
APPELLANT

v.

RAYMOND CULP
APPELLEE

AN APPEAL FROM THE JEFFERSON
COUNTY CIRCUIT COURT
[CV-2004-365-1]

HONORABLE BERLIN C. JONES,
JUDGE

REVERSED AND REMANDED

Appellant Linda Baird appeals from an order of the Jefferson County Circuit Court finding that she failed to prove she sustained any damages arising from her tort complaint against appellee Raymond Culp. On appeal, appellant alleges that (1) the trial court erred in failing to award her any damages, and (2) the trial judge should have recused himself and his failure to do so prejudiced appellant. We reverse and remand.

Appellant met appellee in February 2001. They married in July 2001 only to separate in December 2002. In June/July 2003, the parties divorced. Around the same time as their divorce, appellee began harassing and stalking appellant. Appellee threatened to kill appellant and made several menacing phone calls to her. As a result, appellant filed numerous complaints with the Pine Bluff Police Department. On June 23, 2003, appellant was granted an ex parte temporary order of protection. The existence of the order of protection failed to deter appellee, and on July 11, 2003, the State filed stalking and protection-order-violation charges against appellee. That same day, the Jefferson County

Circuit Court entered another order directing appellee to have no contact with appellant. Despite the court's order, appellee continued to harass and stalk appellant.

On May 18, 2004, appellant filed a complaint in tort against appellee, alleging that he had committed an assault against her when he threatened to kill her. She said that appellee intended to cause her apprehension and that in fact she was put in apprehension of physical harm. She also alleged that appellee had committed the tort of outrage. Appellant asked for compensatory damages in the amount of \$50,000 and punitive damages in the amount of \$100,000. She also asked for a permanent injunction and restraining order.

When appellee did not file an answer, the trial court held a hearing on September 15, 2004. Appellee did not appear at the hearing. At the beginning of the hearing, the trial court announced, "We are here primarily on proof of damages and that the [appellee] is in default."

At the hearing, appellant testified that, since June 2003, appellee had threatened her life and that he would often call her fifty times a day. She stated that appellee would call her at home and at work. During her testimony, appellant described an incident where appellee managed to obtain her pajama top, called and directed her to look on her porch, and when she did, she found her pajama top. She also described an incident where she had gone to meet a repairman at her former home, and while she was there with the repairman, appellee kicked in the door.

Appellant testified that, as a result of appellee's behavior, she changed residences. She said that, despite efforts to ensure that appellee could not locate her, appellee managed to locate her new home and also obtained her new phone number. Appellant testified that she works full time for Delta Counseling and also works under contract as a clinical therapist for Pine Bluff Psychological Associates. She said that appellee's behavior caused her to suffer a financial hardship. She said that, because she did not feel safe in her home, she had

a security system installed and had stayed in a hotel. Appellant also testified that, as a result of appellee's behavior, she began to shake constantly and had a hard time focusing. She said that she spent a lot of time in bed. Appellant sought treatment from her family physician and a "residential" psychiatrist. She said that she was prescribed medication.

Appellant said that she was seeking \$50,000 in compensatory damages because, "My whole life turned upside down. I was scared to death and I don't really scare that easily. I had to take on different jobs. I had to charge most of my way through the summer, because I did not have any money." She also believed that punitive damages were justified.

Pam Cooney, testing administrator at Pine Bluff Psychological, testified that, prior to the summer of 2003, appellant was a hard worker, but during that summer appellant began making mistakes and was unable to work. She said that appellant worked on a part-time basis and was assigned tasks that did not require a lot of concentration. She stated that, when working full-time, appellant would earn \$800 to \$900 per week.

At the conclusion of the hearing, the trial court took the matter under advisement.

On September 23, 2004, appellee filed his answer to appellant's complaint along with a motion to set aside default judgment. Appellee's answer was untimely.¹ That same day, appellant's counsel, Maxie G. Kizer, filed a motion for the court to recuse. Attorney Kizer alleged that due to comments the trial court had made to the district's prosecuting attorney regarding Kizer's representation of appellant, the trial court could not be fair and impartial.²

On October 7, 2004, the trial court entered an order denying the recusal motion. An amended recusal motion was filed on October 19, 2004. In the amended motion attorney Kizer alleged that, in an unrelated matter, he had been granted summary judgment in a case

¹At that time default judgment had yet to be entered.

²In addition to his private practice, attorney Kizer also worked as a part-time prosecutor.

against the court's case coordinator, and due to the court's close working relationship with the case coordinator, the court should recuse to avoid a conflict of interest or the appearance of a conflict. Subsequently, attorney F. Wilson Bynum, Jr. was hired by appellant to pursue the recusal matter. Attorney Bynum later filed a motion for the court to recuse from hearing the motion for the court to recuse.

In an order entered April 12, 2005, that was prepared by attorney Bynum, the trial court allowed appellant to withdraw her motion for the court to recuse and the motion for the court to recuse from hearing the motion for the court to recuse. The trial court thereby dismissed the motions.

On June 24, 2005, the trial court entered an order addressing the matters raised in appellant's complaint. In the first paragraph of the order the trial court stated, "Defendant declared to be in default for failing to answer in a timely manner after proper service. The matter proceeded to trial on damages only." The trial court then proceeded to write the following:

1. Count One - Tort of Assault

The plaintiff failed to present creditable [sic], persuasive evidence that the defendant's conduct was in any way calculated to cause plaintiff to be in fear for her bodily safety. Plaintiff failed to present any medical evidence that established any relationships between any of the defendant's conduct and any alleged trauma or distress experienced by plaintiff. Moreover, the vast majority of the evidence presented by the plaintiff, demonstrated the contrary, i.e. the defendant was in love with plaintiff, wanted to be with her, wanted to provide and protect her. That plaintiff failed to establish any of the defendant's conduct with any injury, illness, pain or suffering on the part of the plaintiff. That the plaintiff failed to established [sic] that the defendant's conduct would cause a reasonable person to be in fear of their bodily safety. That plaintiff's claimed to [sic] the tort of assault is hereby denied.

2. Count Two - Tort of Outrage

The plaintiff failed to present evidence that defendant's conduct was so outrageous that it would shock the conscience of a reasonable person or was beyond the comprehension of members of society. Plaintiff's claim for the tort

of outrage is hereby denied.

3. Count Three - Injunction

Plaintiff presented much evidence that the defendant has interfered in her life to the extent the plaintiff desires assistance from the law enforcement, judicial authorities or the other agencies to correct the problem or punish the defendant for his conduct. The criminal action is pending and a temporary restraining order is presently in effect, with a court date to make the same permanent. This could result in the defendant being incarcerated, thus the petition is premature and is hereby denied.

4. Count Four - Punitive Damages

Plaintiff failed to succeed on her claim for compensatory damages. The Court further finds that plaintiff has not presented any creditable [sic] evidence that rise [sic] to the level that defendant's conduct was such that the defendant should be punished for engaging in said conduct, nor that the defendant should be so punished as to cause the defendant and other similarly situated, to not engage in same or similar conduct against the plaintiff or other members of society similarly situated.

From this order appellant now brings her appeal.

When a civil case is tried by a circuit court sitting without a jury, our inquiry on appeal is not whether there is substantial evidence to support the factual findings of the court, but whether the findings are clearly erroneous, or clearly against the preponderance of the evidence. *Tygart v. Kohler*, 82 Ark. App. 380, 109 S.W.3d 147 (2003). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed. *Id.*

On appeal, neither party challenges the trial court's finding of default; therefore, we do not address whether the trial court's finding of default was proper. In her first point on appeal appellant argues that the trial court erred in not awarding her any damages after default judgment was entered against appellee. She specifically argues that (1) the trial court erred when it looked to the merits of her claims instead of focusing upon the issue of damages, and (2) she presented ample proof of damages.

Rule 55 (a) of the Arkansas Rules of Civil Procedure provides that “[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, judgment by default may be entered by the court.” Although default judgments are not favored in the law, a default judgment is just as binding and enforceable as a judgment entered after trial on the merits. *State v. \$258,035 U.S. Currency*, 352 Ark. 117, 98 S.W.3d 818 (2003). Generally, a default judgment establishes liability but not the extent of damages. *Jean-Pierre v. Plantation Homes*, 350 Ark. 569, 89 S.W.3d 337 (2002); *Miller v. Transamerica Commercial Fin. Corp.*, 74 Ark. App. 237, 47 S.W.3d 288 (2001). A hearing is required to determine the amount of damages, and the plaintiff is required to introduce evidence of the damages. *Tharp v. Smith*, 326 Ark. 260, 930 S.W.2d 350 (1996). However, after receiving the evidence, the trial court may not transform the judgment from one of default to one based on the merits such that Rule 55 no longer applies. *Id.*

Here, after receiving the evidence, the trial court then entered an order that decided the case on the issue of liability. Appellant was only required to present proof of her damages. If we were to allow the trial court’s decision to stand, we would be emasculating Rule 55. We hold that the trial court erred when it looked to the merits of appellant’s liability claim instead of limiting its focus to the issue of damages; therefore, we reverse the trial court’s decision and remand this matter back to the trial court for an order consistent with this opinion. Because we agree with appellant’s assertion that the trial court erred when it decided the merits of her cause of action, we do not address whether appellant presented adequate proof of damages.

On appeal, appellant also argues that the trial judge should have recused himself in this case and that his refusal to do so prejudiced her. The facts of this case indicate that, in

an order dated April 12, 2005, the trial court allowed appellant to withdraw her recusal motion; therefore, she cannot now complain of any error. *See Precision Steel Warehouse, Inc. v. Anderson-Martin Mach. Co.*, 313 Ark. 258, 854 S.W.2d 321 (1993).

Because the trial court, after declaring appellee in default, focused on the merits of appellant's liability claims instead of limiting its focus to the issue of what, if any, damages appellant sustained, we reverse and remand this matter to the trial court.

Reversed and remanded.

BIRD and BAKER, JJ., agree.